

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Z. F.,)	
)	
Plaintiff,)	
vs.)	NO. 4:04-cv-00073-DFH-WGH
)	
SOUTH HARRISON COMMUNITY SCHOOL)	
CORPORATION,)	
HARRISON COUNTY SPECIAL)	
EDUCATION COOPERATIVE,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Z.F., a minor, by his parents and)	
next friends, STEPHEN FOSTER and)	
KARA FOSTER,)	
)	
Plaintiffs,)	
)	
v.)	CASE NO. 4:04-cv-0073-DFH-WGH
)	
SOUTH HARRISON COMMUNITY)	
SCHOOL CORPORATION and HARRISON)	
COUNTY SPECIAL EDUCATION)	
COOPERATIVE,)	
)	
Defendants.)	

ENTRY ON EFFECT OF "STAY-PUT" PROVISION

On September 1, 2005, the court entered a final judgment in this action under the federal Individuals with Disabilities Education Act, or IDEA. The judgment modified in part and affirmed the individualized education program (IEP) approved by the state Board of Special Education Appeals for plaintiff Z.F., a young boy with autism. The court directed the defendants to implement the modified IEP immediately, to convene a new IEP conference within 45 days, and to decide on a new IEP within 30 days after that.

A controversy quickly crystallized between the parties over whether the statutory “stay-put” provision would require the continuation of Z.F.’s prior program through any further judicial appeals. The court’s entry stated that the

IEP as modified becomes the new status quo for purposes of the stay-put provision, so that the district will not be obliged to continue funding the at-home ABA program once the transition period described by the IHO has been completed. See *Andersen v. District of Columbia*, 877 F.2d 1018, 1023-24 (D.C. Cir. 1989) (after the district court rules, even if further appeal is pending, stay-put provision does not prevent implementation of district court’s judgment).

Mem. Op. at 49.

Plaintiffs have filed a motion to reconsider, arguing that the language of the applicable federal and state statutes and regulations should require the stay-put provision to stay in effect throughout any appeals. The federal statute provides:

Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j). (The exception in subsection (k)(4), which addresses disciplinary problems, does not apply here.) The implementing federal regulation uses the same critical language: “any administrative or judicial proceeding. . . .”

See 34 C.F.R. § 300.514(a).

The United States Court of Appeals for the District of Columbia Circuit held that essentially identical language in an earlier version of the IDEA meant that the automatic stay-put provision stayed in effect until the district court issued its decision but did not apply during further judicial appeals. *Andersen v. District of Columbia*, 877 F.2d 1018, 1023-24 (D.C. Cir. 1989), interpreting 20 U.S.C. § 1415(e)(3) (1988). The *Andersen* decision is directly on point and appears to be the only published appellate decision on this specific issue. In this court's view, the *Andersen* decision is persuasive and authoritative on this point, and this court follows it. Plaintiffs have not directed the court's attention to any case disagreeing with *Andersen* on this point.

Plaintiffs also rely on the Indiana regulations that implement the IDEA. The state stay-put regulation provides:

Except as provided in 511 IAC 7-29-3 and 511 IAC 7-29-7, the student shall remain in the student's current educational placement during a due process hearing, administrative appeal, or judicial proceeding, unless the parties agree otherwise. If the proceedings extend beyond the end of the school year and the placement includes normal grade advancement, that advancement shall proceed unless normal grade advancement is at issue. If the last agreed-upon placement cannot be determined, the independent hearing officer shall determine the student's educational placement.

511 Ind. Admin. Code § 7-30-3(j). The Indiana regulation tracks the federal statute in its reference to a "judicial proceeding." Without contrary indications from the Indiana courts, this court assumes that the Indiana regulation is intended to be construed consistently with the federal statute and regulation. See

Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E.2d 135, 140 & n.7 (Ind. 1999) (construing state legislation consistently with federal judicial interpretations of parallel federal statutes, and applying “well-established” principle that “when a legislature adopts language from another jurisdiction, it presumably also adopts the judicial interpretation of that language”).

Accordingly, plaintiffs’ motion to reconsider is hereby denied. Defendants’ motion for clarification is granted. Defendants shall proceed immediately to implement the IEP as modified by the BSEA and by this court.

So ordered.

Date: September 9, 2005

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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